No. 85-1563

IN THE

Supreme Court of the United States

October Term, 1985

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

ALBERT GREENWOOD BROWN, JR.,

Respondent.

On Writ of Certiorari To The Supreme Court Of The State of California

BRIEF FOR AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, ACLU OF SOUTHERN CALIFORNIA AND ACLU OF NORTHERN CALIFORNIA IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting fundamental rights, including the rights of criminal defendants. The ACLU opposes capital punishment, and works in a variety of forums, including litigation, public education, and legislative advocacy on behalf of people facing death sentences. The ACLU's of Northern and Southern California are the California affiliates of the ACLU.

SUMMARY OF ARGUMENT

This case presents the exceedingly narrow issue whether someone may be

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[1] The parties' letters of consent to filing of this brief are being filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

sentenced to die by a jury that had been given two improper instructions: (1) not to be swayed by sympathy for the defendant in setting penalty; and (2) to consider mitigating circumstances which relate to the crime, but not instructed also to consider the character and record of the offender. This combination of instructions renders unconstitutional the resulting death sentence, as the California Supreme Court found.[2]

In its petition for certiorari, the State of California incorrectly implies that affirmance of the California Supreme Court would draw in question some

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[2] The second instruction is "fairly included" in the question on which certiorari was granted, see Sup. Ct. R. 21.1(a); Procunier v. Navarette, 434 U.S. 555, 559-60 n.6 (1978); accord United States v. Mendenhall, 446 U.S. 544, 551-52 n.5 (1980), because of the close nexus between the two instructions. See pp. 23-45, 47-51 infra.

170 death sentences in that state and perhaps elsewhere. Pet. for Cert. 25, 26, 63.

To the contrary, the trial court in the present case used an unusual sentencing scheme involving the two instructions identified above. No other state has a similar system.

In fact, even in California the present case is something of an historical curiosity. The no-sympathy issue has been clear in California for many years. The drafters of the no-sympathy instruction specifically included a Use Note specifying that it "should not be used in the penalty phase of a capital case." California Jury Instructions - Criminal [CALJIC] §1.00 (4th ed. 1982 & Supp. 1986) (emphasis added). This Use Note has been part of the CALJIC instructions since 1970 (except for three

years between 1979 and 1982 when the Note was omitted for unknown reasons). See People v. Easley, 34 Cal.3d 858, 877 & n.5, 671 P.2d 813 (1983). Thus, very few California cases will be affected by the disposition of this one. The Court might wish to dismiss the writ as improvidently granted, given that affirmance of the California Supreme Court need not affect a significant number of cases in California or elsewhere.

In any event, the writ should be dismissed for lack of jurisdiction. The California Supreme Court's decision rests on at least two independent and adequate state grounds. The California court disapproved the no-sympathy instruction using its supervisory powers, and disapproved the jury instruction concerning nonstatutory mitigating

circumstances as a matter of state statutory construction. This Court therefore lacks jurisdiction.

Assuming arguendo that this Court were to reach the merits, the California Supreme Court should be affirmed.

First, the no-sympathy instruction violated the Eighth and Fourteenth Amendments. Sympathy, although not itself a mitigating circumstance, is the emotion triggered by compelling mitigating evidence. If jurors are told to squelch their feelings of sympathy, they will be unable to give appropriate weight to the mitigating evidence presented. The Georgia Supreme Court has so held; the unanimous Court of Appeals for the Eleventh Circuit, en banc, also did so in an analogous case.

Second, the instruction on nonstatutory mitigating circumstances

was unconstitutionally restrictive. The jury was told only to consider mitigating circumstances that extenuated "the gravity of the crime" (emphasis added). Nothing focused the jury's attention on aspects of Brown's character and record that might warrant a sentence other than death. This Court's cases, beginning with Lockett v. Ohio, 438 U.S. 586 (1978), and continuing through Skipper v. South Carolina, __ U.S. __, 54 U.S.L.W. 4403 (1986), require that sentencing juries consider precisely such evidence of character, record and propensities. The absence of such guidance "introduce[d] a level of uncertainty and unreliability into the ... process that cannot be tolerated in a capital case." Beck v. Alabama, 447 U.S. 625, 643 (1980). The error was highly prejudicial because the defendant

here, as in Skipper, had introduced evidence suggesting inter alia that he would not be a future disciplinary problem if incarcerated for life rather than executed.

Finally, assuming arguendo that neither of the instructions by itself required reversal of the death sentence, the two taken together plainly did. The self-reinforcing instructions collectively obliged the jury to set the penalty without giving independent mitigating weight to the evidence proffered by the defense. Where, as here, there is substantial risk that the jury has set the penalty without fully considering such evidence, "Lockett compels a remand so that we do not 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" Eddings v.

Oklahoma, 455 U.S. 104, 119 (1982) (O'Connor, J., concurring) (citation omitted).

ARGUMENT

I.

THE INSTRUCTIONS IMPERMISSIBLY PRECLUDED THE JURY FROM EXERCISING MERCY BASED ON SYMPATHY ENGENDERED BY MITIGATING EVIDENCE

The no-sympathy instruction was erroneous both as a matter of state and federal law. Because there is an independent and adequate state ground for the California court's decision, this Court should dismiss the writ for lack of jurisdiction. Sup. Ct. R. 16.1(b); Fox Film Corp. v. Muller, 296 U.S. 207, 211 (1935). Assuming arguendo that the Court nevertheless were to reach the merits, it should affirm the California Supreme Court. The Constitution requires that juries be free to spare the

lives of capital defendants based on feelings of sympathy engendered by mitigating evidence.

A. BECAUSE OF THE PRESENCE OF AN INDEPENDENT AND ADEQUATE STATE GROUND, THE COURT SHOULD DISMISS FOR LACK OF JURISDICTION.

In capital cases, like all others, states may provide defendants protections greater than those required by the U.S. Constitution. California v. Ramos, 463 U.S. 992, 1014-15 (1983). The Supreme Court of course may not review decisions of state courts that rest on such independent and adequate state grounds. Michigan v. Long, 463 U.S. 1032, 1041-42 (1983).

This is precisely such a case. The California Supreme Court -- relying on a series of state cases dating back to 1957 -- declared that the no-sympathy instruction was reversible error.

People v. Bandhauer, 1 Cal.3d 619, 618, 463 P.2d 408 (1970); People v. Polk, 63 Cal.2d 443, 451, 406 P.2d 641 (1965), cert. denied, 384 U.S. 1010 (1966); People v. Friend, 47 Cal.2d 749, 767-68, 306 P.2d 463 (1957). None of these decisions cited any federal constitutional authority as the basis for decision. For this reason, these cases must be based on the California Supreme Court's supervisory power over lower California courts.

In granting a stay in the present case, 54 U.S.L.W. 3787 (1986), Justice Rehnquist acknowledged the state-law nature of those decisions but expressed the view that they had become constitutionalized during the 1980s. Justice Rehnquist opined that, when the California court adhered to the Bandhauer-Polk-Friend rule when deciding new

cases in 1982 and 1983, and by finding at that time further support for the rule in U.S. Supreme Court cases, California had forfeited the independent state-law character of its rule. 54 U.S.L.W. at 3787, citing People v. Easley, 34 Cal.3d 858, 876, 671 P.2d 813 (1983), and People v. Robertson, 33 Cal.3d 21, 56-59, 655 P.2d 279 (1982).

Amici respectfully suggest that Justice Rehnquist's tentative views in Chambers (made, as they were, without the benefit of full briefing on the history of the no-sympathy instruction in California) should be reconsidered. This Court of course may review constitutional issues where "'the [state] court felt compelled by what it understood to be federal constitutional considerations to construe ... its own [constitution] in the manner it did.'"

Delaware v. Prouse, 440 U.S. 648, 653 (1979), quoting Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977). There certainly may be a federal constitutional question when a state court, in light of binding federal precedent, announces a new principle of state constitutional law to bring its law into conformity with the perceived federal constitutional mandate.

The present case, however, is precisely the opposite. California has prohibited no-sympathy instructions for almost 30 years. Recently, the California court in effect noted that federal law had come around to the same result. Even if the California court were wrong in its dictum concerning federal law, nothing in this or any other California case suggests an inclination to abandon the 30-year-old state

rule. Absent such an indication, this Court should respect California's long-standing rule and dismiss this case for lack of jurisdiction. To hold otherwise would establish the anomalous principle that, when a state believes federal law has caught up with preexisting state law, the state court jeopardizes the independent character of its rule by acknowledging the perceived change in federal law. Amici are aware of no case that so holds.[3]

For these reasons, the Court should dismiss the writ for lack of jurisdiction.

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[3] Nothing in Michigan v. Long, 463 U.S. 1032 (1983), requires a different result. In that case, the Court made clear that state courts normally should specify more clearly the independence of any ruling based on state law. That rule is not implicated here, however, given California's 30-year unbroken chain of state-law decisions condemning the no-sympathy instruction.

B. IN ANY EVENT, THE NO-SYMPATHY INSTRUCTION IS REVERSIBLE CONSTITUTIONAL ERROR.

It now is clear beyond cavil that a "sentencer must consider any relevant evidence or arguments that the death penalty is inappropriate for a particular defendant." Enmund v. Florida, 458 U.S. 782, 828 (1982) (O'Connor, J., concurring in the judgment).[4] In particular, juries must consider "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." Woodson v. North Carolina, 428 U.S. at 304 (plurality opinion), cited in California v. Ramos, 463 U.S. at 1001 n.13.

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4 Although this opinion is denominated a "dissenting" opinion, 458 U.S. at 801, it reaches the same judgment as the majority, id. at 827 n.43.

Consistent with these principles, the California Supreme Court has condemned the no-sympathy instruction in the penalty phase of a capital case. This is a firm principle of California law, see supra pp. 9-13; it is an equally firm principle of federal law.

Sympathy, of course, is not by itself a mitigating circumstance; it is an emotion engendered by mitigating facts. In the penalty phase of a capital case, a jury makes a "moral assessment of those facts as they reflect on whether defendant should be put to death." People v. Haskett, 30 Cal.3d 841, 863, 640 P.2d 776 (1982) (per Mosk, J.). If the jury's moral assessment of the evidence in mitigation is sympathetic to the defendant in sufficient measure, that sympathy may "persuade the jury that death is not the appropriate

penalty." People v. Lanphear, 36 Cal.3d 163, 167, 680 P.2d 1081 (1984). Conversely, to instruct a jury to ignore sympathy is to instruct it to squelch precisely the moral assessment that mitigating evidence is intended to elicit.

The Court of Appeals for the Eleventh Circuit has reversed death sentences for just this reason. In Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985) (en banc), cert. denied, 54 U.S.L.W. 3866 (1986), the prosecutor in a capital case had argued to the jury to have "no sympathy with that sickly sentimentality that springs into action whenever a criminal is at last about to suffer for

a crime." Id. at 1458.[5] He continued, "We have had too much of this mercy." Id. The en banc Court of Appeals, without dissent, vacated the death sentence. The prosecutor's argument "was fundamentally opposed to current death penalty jurisprudence," the court declared. Id. at 1460. "[T]he suggestion that mercy is inappropriate was not only a misrepresentation of the law, but it withdrew from the jury one of the most central sentencing considerations, the one most likely to tilt the decision in favor of life." Id. (emphasis added).

[5] In Drake, the prosecutor was quoting by name from an ancient opinion of the Georgia Supreme Court, see Eberhart v. State, 47 Ga. 598, 610 (1873), and the argument was improper in part for that reason. But in a later case, Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985), cert. denied, 54 U.S.L.W. 3777 (1986), the prosecutor had made the same arguments without attributing them to any court. The court of appeals vacated the death sentence in that case as well.

Similarly, the California Supreme Court correctly held that the Eighth and Fourteenth Amendments:

> not only permit, but mandate freedom on the part of the jury to act on the basis of sympathy or compassion when that sympathy is a reaction to evidence regarding the defendant's character or background. That evidence, as distinguished from mitigating circumstances related to the offense itself, may not reduce culpability, but it must nonetheless be considered by the jury. It necessarily follows that the jury must be free to respond to it.

People v. Lanphear, 36 Cal.3d at 166 (emphasis added) (citations omitted).

The State's position apparently is that, if jurors are allowed to consider sympathy factors, the Court will have returned to the standardless decision-making that led to this Court's decision in Furman v. Georgia, 408 U.S. 238 (1972). Brief for Petitioner at 44-48. There are two responses.

First, this Court already has made clear that California sentencing juries receive substantial guidance. Pulley v. Harris, 465 U.S. 37, 51 (1984).

Second, nothing in the California sentencing system, as explicated by the California Supreme Court in this case, leaves the jury unconstitutionally at sea. California simply has made clear that feelings of sympathy, brought about within a juror by the mitigating evidence presented, are appropriate for jury consideration.

This Court's decisions support the conclusion of the California Supreme Court. This Court has "never suggested that the United States Constitution requires that the sentencing process should be transformed into a rigid and mechanical parsing of statutory ... factors." Barclay v. Florida, 463 U.S.

939, 950 (1983) (plurality opinion). In Barclay, a trial judge imposed a death sentence after concluding, based on his personal experiences in war and criminal law, that the murder was "shocking" even to someone "not easily shocked or moved by tragedy." Id. at 948 n.6. This Court affirmed the death sentence. Justice Rehnquist, for the plurality, concluded that the trial judge's visceral reaction to the facts of the case did not render it constitutionally suspect. Sentencers in capital cases should be "'free to consider a myriad of factors to determine whether death is the appropriate punishment,'" he declared. Id. at 950, quoting California v. Ramos, 463 U.S. at 1008. It is wholly permissible for the sentencer to consider subjective feelings and reactions in the process;

indeed, it would be improper for a state "to attempt to separate the sentencer's decision" from them. 463 U.S. at 950. In sum, "It is neither possible nor desirable for a person to whom the State entrusts an important judgment to decide in a vacuum ...." Id.

The State cannot have it both ways. If sentencers in passing judgment lawfully may take into account outrage engendered by the evidence in aggravation, the Constitution at a minimum requires that sentencers not be ordered to squelch feelings of sympathy engendered by the evidence in mitigation.

C. THE GEORGIA SUPREME COURT ALSO HAS EXPLICITLY CONDEMNED THE NO-SYMPATHY INSTRUCTION.

The State is incorrect in suggesting (pp. 60-62) that its position is supported by the weight of authority from other states. In Legare v. State,

250 Ga. 875, 302 S.E.2d 351 (1983), the Georgia Supreme Court considered and condemned a no-sympathy instruction virtually identical to the one at issue here. The jury in Legare had been instructed: "[T]he law does not permit jurors in arriving at their verdict to be governed by sympathy or prejudice. You may not and should not, therefore, render a verdict in this case upon sympathy for either party or prejudice against either party." 302 S.E.2d at 353-54. The Georgia Supreme Court held that this instruction was reversible error. "[T]he evidence in mitigation might well evoke sympathy," the court declared. Id. at 354 (emphasis added). "Because the charge complained of might well confuse the jury and limit their constitutionally required consideration

of evidence in mitigation, we hereby disapprove it." Id. (emphasis added).

In sum, contrary to the State's implication, the California Supreme Court is not alone in condemning the no-sympathy instruction.

II.

THE INSTRUCTIONS IMPERMISSIBLY PRECLUDED THE JURY FROM CONSIDERING NONSTATUTORY MITIGATING FACTORS PERTAINING TO THE DEFENDANT'S CHARACTER AND RECORD

Amici submit that the Georgia Supreme Court and California Supreme Court are correct: a no-sympathy instruction is federal constitutional error in all cases. Even if this Court were to believe otherwise, however, the death sentence still cannot stand. The sentence in any event was unconstitutional under this Court's decisions in Lockett, Eddings and Skipper, because the jury was improperly instructed on the role

of mitigating factors in its deliberations. Brown introduced substantial mitigating evidence demonstrating inter alia that, if his life were spared, he would not be a disciplinary risk in prison. See Skipper, __ U.S. __, 54 U.S.L.W. 4403, 4404 n.1 (1986). The instructions, however, precluded the jury from considering that evidence.

A. A CAPITAL DEFENDANT IS ENTITLED TO PROFFER, AND HAVE THE JURY CONSIDER, ALL RELEVANT EVIDENCE IN MITIGATION OF PUNISHMENT.

A fundamental precept of constitutional death penalty law is that a defendant may offer, and the jury must consider, all relevant evidence in mitigation of punishment.

Lockett v. Ohio, 438 U.S. 586 (1978), involved an Ohio statute that allowed the sentencer to consider only three enumerated mitigating circum-

stances. The Supreme Court held the statute unconstitutional and vacated the death sentence:

> [T]he Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record ... that the defendant proffers as a basis for a sentence less than death.

Id. at 604 (some emphasis added) (plurality opinion of Burger, C.J.).

Eddings v. Oklahoma, 455 U.S. 104 (1982), carried the principle one step further. In Eddings, a capital defendant had been allowed to introduce evidence of his troubled family history, but the sentencer (the trial court) gave it no weight in mitigation of punishment. This Court vacated the death sentence, noting that the Eighth and Fourteenth Amendments require the fact-finder to consider "'the character and

record of the individual offender'" as "'a constitutionally indispensable part of the process of inflicting the penalty of death.'" Id. at 112, quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976). In order to consider these factors meaningfully, the sentencer must have "'adequate information and guidance'"; this occurs only when the sentencer's "'attention is focused on the characteristics of the person who committed the crime ....'" 455 U.S. at 111 n.6 (emphasis added), quoting Gregg v. Georgia, 428 U.S. 53, 197 (1976). The Court acknowledged that the Oklahoma statute at issue, unlike the Ohio statute in Lockett, did allow the defendant to present evidence "as to any mitigating circumstance." Okla. Stat. tit. 21, §701.10. The Court held, however, that mere introduction of evidence in mitiga-

tion is constitutionally insufficient when the sentencer does not understand its responsibility to consider that evidence. 455 U.S. at 113-15 & n.10.

Next, in Enmund v. Florida, 458 U.S. 782 (1982), the Court unanimously vacated the death sentence. Five justices held that the death penalty never could be imposed on one who did not personally take a life or intend to take a life. Id. at 1143-54. Significantly, the remaining four Justices (per O'Connor, J.), relying on Lockett and Eddings, concurred in the judgment. See note 4 supra. They noted that, "in deciding whether or not to impose capital punishment ... , a sentencer must consider any relevant evidence or arguments that the death penalty is inappropriate for a particular defendant." Id. at 1171 (emphasis added). In

Enmund's case, as in Eddings, the sentencer had been allowed to hear evidence in mitigation. Id. at 1172. That is insufficient, the four Justices declared, since the sentencer still had a "fundamental misunderstanding" of what it could do with the information. Id. at 1173. If the sentencer does not know how to "consider the mitigating circumstances proffered by the defendant," id. at 1172, the resulting death sentence cannot stand.

Recently, this Court further confirmed the capital defendant's right to have the sentencer consider all evidence in mitigation of his sentence. Skipper v. South Carolina, __ U.S. __, 54 U.S.L.W. 4403 (1986). In Skipper, the trial court excluded testimony that the defendant had conducted himself well during the seven and one-half months he

spent in jail between his arrest and trial. This Court[6] held that, under Lockett and Eddings, the defendant had a right to proffer and have the jury consider evidence of his good behavior. 54 U.S.L.W. at 4403.

A primary precept of constitutional death penalty law thus is that the Eighth and Fourteenth Amendments not only authorize capital defendants to proffer, they require sentencing juries actually to consider, all relevant evidence in mitigation of punishment.

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6 Skipper was a 6-3 decision. The split primarily resulted from the dissenters' view that "the defendant's behavior in prison following his arrest" was irrelevant. 54 U.S.L.W. at 4407 (Powell, J., dissenting) (emphasis added). Nothing in that dissenting opinion draws in question the fundamental validity of the Lockett-Eddings line of cases. Moreover, the evidence tendered in the present case focused on Brown's adaptability to future prison life, not on his pretrial incarceration.

B. CAPITAL SENTENCING PROCEDURES, ESPECIALLY JURY INSTRUCTIONS, MUST ENSURE THAT THE DECISION TO IMPOSE DEATH IS HIGHLY RELIABLE.

A second fundamental precept of modern death penalty law is that trial courts must use available procedural devices, such as jury instructions, to ensure accuracy and reliability in the decision to impose death. Because "there is a significant constitutional difference between the death penalty and lesser punishments," this Court has "invalidated procedural rules that tended to diminish the reliability of the sentencing determination." Beck v. Alabama, 447 U.S. 625, 637-38 (1980).

The constitutional requirement of reliability is a recurring theme in this Court's capital cases. As Justice O'Connor pointed out for the Court in California v. Ramos, 463 U.S. 992, 998-

99 (1983), "the qualitative difference of death from all other punishments requires the correspondingly greater degree of scrutiny of the capital sentencing determination." To be constitutional, court procedures must enhance, not diminish, the reliability of sentencing. Ford v. Wainwright, __ U.S. __, 54 U.S.L.W. 4799, 4802 (1986) ("fact finding procedures [must] aspire to a heightened standard of reliability"), citing Spaziano v. Florida, 468 U.S. 447, 456 (1984).[7]

Jury instructions are among the most important procedural safeguards available to courts to ensure sentencing

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7 Many cases repeat the theme that courts must use available procedural safeguards to enhance the reliability of the decision to impose death. See, e.g., Caldwell v. Mississippi, 472 U.S. ___, 53 U.S.L.W. 4743 (1985); Gardner v. Florida, 430 U.S. 349, 362 (1977) (plurality opinion); id. at 364 (White, J., concurring).

reliability. In Beck v. Alabama, 447 U.S. at 628-29, a state statute prevented the court from instructing the jury on lesser-included offenses to capital robbery-murder. The jury thus was "given the choice of either convicting the defendant of the capital crime ... or acquitting him." This Court reversed the conviction. It held that the trial court's failure to use the procedural device of complete jury instructions "inevitably ... enhance[d] the risk of an unwarranted" death sentence. Id. at 637. To so tip the balance toward death is to "introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." Id. at 643 (emphasis added).

C. THE TRIAL JUDGE THEREFORE WAS CONSTITUTIONALLY OBLIGATED TO INSTRUCT THE JURY ON BROWN'S THEORY OF MITIGATION.

From the first two precepts -- the rights to consideration of nonstatutory mitigation and to accurate instructions to ensure reliability -- flows a third: the trial court must specifically instruct the jury to consider evidence of a nonstatutory mitigating circumstance pertaining to the defendant's background, character and propensities. The jury instructions in this case failed to do so.

1. All defendants are entitled to instructions on their theory of the case.

Jury instructions on the applicable substantive law and defenses raised by the facts are fundamental even in noncapital cases. United States v. Grimes, 413 F.2d 1376, 1378 (7th Cir.

1969). See, e.g., Carter v. Kentucky, 450 U.S. 288, 302 (1981); Bird v. United States, 180 U.S. 356, 361 (1901); United States v. Hicks, 748 F.2d 854, 857-58 (4th Cir. 1984); United States v. Timberlake, 559 F.2d 1375, 1379 (5th Cir. 1977).

All defendants -- especially capital defendants -- are entitled to jury instructions pertinent to their theory of the case for at least three reasons:

> First, the reference enables the jurors to remember more clearly the factors described in the instruction. Second, it describes the legal theory of the party that introduced the evidence and explains the way in which the evidence presented supports this theory. Third, the trial judge's explicit reference to the party's legal theory cloaks the theory in the authority and credibility of the judge.

Hertz & Weisberg, In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consi-

deration of Mitigating Circumstances, 69 Calif. L. Rev. 317, 347 (1981) (emphasis added).[8]

These principles apply with particular force in capital cases. In Williams v. United States, 131 F.2d 21 (D.C. Cir. 1942), the court said:

> [O]f what value is an open mind, if it does not know, with clear delineation, the issues upon which it is to pass judgment? Just as a lawyer might be ignorant in a meeting of scientists, so may a juror be in his casual acquaintance with the law. The jury, a group of responsible citizens, is entitled to this legal instruction if it must accept the duty of passing upon the very life and death of a man.

Id. at 23 (emphasis added).

Eddings v. Oklahoma, 455 U.S. 104 (1982), illustrates the necessity of complete instructions on mitigating

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[8] See also Carter v. Kentucky, 450 U.S. at 302 n.20 (trial judge's "lightest word or intimation" is given great weight by jury).

circumstances. In that case, the defendant had been allowed to introduce mitigating evidence, but the record was unclear whether the sentencer had considered that evidence. The Court held that it is not enough that a defendant be allowed simply "to present evidence 'as to [a] mitigating circumstance.' Lockett [v. Ohio] requires the sentencer to listen." Id. at 115 n.10 (emphasis added).

In Eddings, the trial judge was the sentencer. Where a lay jury is the sentencer, the need for clear communication of fundamental sentencing principles plainly is even greater. See Gregg v. Georgia, 428 U.S. 153, 192 (1976) (plurality opinion) (When sentencing is by a jury, "the provision of relevant information under fair procedural rules is not alone sufficient to guarantee

that the information will be properly used in the imposition of punishment.").[9]

2. Brown presented highly relevant mitigating evidence in this case.

In the present case, Brown presented substantial mitigating evidence. The evidence showed that, if Brown were incarcerated for life, he would not be a disciplinary problem.

If a propensity for further crimes may be a factor in aggravation, see Jurek v. Texas, 428 U.S. 262 (1976), the absence of such a propensity must be a

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9 "Without an itemized instruction, the average jury may be unable to extrapolate from the mass of mitigating evidence presented the mitigating circumstances that, in the defense's view, provided independent and sufficient ground for rejecting the death penalty. The uninstructed jury may be unable to consider the mitigating factors in the sense intended by Lockett." Hertz & Weisberg, supra pp. 34-35, at 345-46 (emphasis added).

relevant factor in mitigation. Skipper v. South Carolina, 54 U.S.L.W. 4403, 4404-05 (1986) (evidence that defendant would not pose a danger if not executed is highly relevant); California v. Ramos, 463 U.S. at 1003 (the jury lawfully may "assess whether the defendant is someone whose probable future behavior makes it undesirable that he be permitted to" live; jurors are entitled to predict what the defendant might do if not put to death).

That Brown would not be dangerous to prison staff and inmates; that he is not a generally violent person; that he does not have a lengthy prior record of violent crime; and that he is not likely to be a discipline risk in prison; all was highly relevant evidence for the jury to consider. Skipper, 54 U.S.L.W. at 4404-05. Similarly relevant was

evidence of Brown's broken home and basic good nature and values. E.g., Eddings, 455 U.S. at 113 & n.18 (defendant's family background is potentially mitigating evidence).

3. The actual jury instructions were constitutionally deficient because they excluded Brown's evidence from the jury's consideration.

As the California Supreme Court held, the trial judge should have explicitly instructed the jury that it could consider in mitigation, at a minimum, any "'aspect of [Brown's] character or record,' whether or not related to the offense for which he is on trial, in deciding the appropriate penalty." People v. Brown, 40 Cal.3d at 537, quoting Eddings, 455 U.S. at 113-

15.[10]

The instruction actually given failed to provide the necessary guidance. Besides requiring consideration of certain facts not relevant here, it merely allowed the jury to consider "[a]ny other circumstances which extenuate the gravity of the crime even though it is not a legal excuse for the crime" (emphasis added). Such an instruction simply did not tell the jury how to consider the evidence, enumerated above, of nonstatutory mitigating circumstanc-

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10 In denying the State's petition for rehearing the Court approved specific language for a new instruction to be used in future cases, 41 Cal.3d 439e, ___ P.2d ___ (1986).

es pertaining to Brown personally.[11]

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11 The California Supreme Court's holding to this effect is yet another independent and adequate state-law basis for the decision under review. The court held that the jury must be given something more than the misleading instruction set forth above by construing the California statute. The court so held by "clarifying [the] statutory language," id., because the court believed a "prophylactic instructio[n]" was necessary to avoid "confusion," id. at 539 n.9 (emphasis added). Far from ruling that any aspect of the death penalty statute was unconstitutional, the court's construction "honors the plain language of section 190.3 ... explains the most likely 'constitutional' intent of the drafters and avoids the constitutional difficulties." Id. at 541, 545. As Justice Rehnquist indicated very recently, such "a state prophylactic rule," even one "designed to insure protection for a federal constitutional right," rests upon an independent and adequate state ground. Delaware v. Van Arsdall, 475 U.S. ___, 54 U.S.L.W. 4347 (1986).

FOOTNOTE 11 CONTINUED ON NEXT PAGE

Instead of dealing directly with this argument, the State simply asserts, without explanation or citation (e.g., pp. 26, 53), that the instructions did

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FOOTNOTE 11 CONTINUED FROM PREVIOUS PAGE

This case thus is unlike Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138 (1984), or United Air Lines, Inc. v. Mahin, 440 U.S. 623 (1973). Those cases hold that a federal question survives for Supreme Court review where "a state court ... construe[s] state law narrowly" to avoid a conflict with the federal constitution. Three Affiliated Tribes, 467 U.S. at 138; accord United Air Lines, 410 U.S. at 630-32. In the present case, by contrast, the California Supreme Court did not hold that its statutory analysis was necessary to avoid unconstitutionality. The court merely required that a "prophylactic instruction," 40 Cal.3d at 539, of the kind Justice Rehnquist cited in Van Arsdall, be given (1) to eliminate juror confusion and (2) to avoid the need even to enter the sphere of constitutional adjudication.

ensure that "the jury will consider all relevant evidence relating to the offense and offender as mandated by this Court" (emphasis added).[12]

The State's position now is difficult to square with its district attorney's closing argument. Referring to this instruction, the prosecutor told the jury:

> Finally, ... there is the factor of other circumstances which extenuate the gravity of the crime even though not a legal excuse. If present, it might mitigate, if absent there is no mitigation.
>
> There is no evidence ... which extenuates the gravity of this crime ....
>
> * * * *
>
> ... [N]o mitigation. No mitigation, no mitigation, no mitigation, no mitigation, no mitigation.

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12 The State interlards its brief with at least nineteen unsupported assertions that the jury considered "the offense and the offender" in setting penalty (emphasis added), as if by force of repetition to reshape the jury instruction that actually was given.

(J.A. 89-90, 94; emphasis added.)[13]

This combination of instructions and arguments frustrated Brown's theory of defense. Brown's primary hope of avoiding the death penalty was in persuading the jury to give weight to his mitigating evidence, such as the evidence that he would not be a disciplinary risk if his life were spared. Skipper, 54 U.S.L.W. at 4404 n.1. The judge, however, did not instruct the jury, even in the most general terms, that it could consider that

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[13] The prosecutor also dismissed Brown's evidence as "a blatant attempt by the defense to inject personal feelings in the case" (J.A. 91). He continued:

> Hard as it is to say, ladies and gentlemen, the request that you heard to show mercy ... in this case have [sic] to be ignored and set aside. You have a duty beyond that and those appeals, ladies and gentlemen, would be ... inappropriate and improper to consider ....

(J.A. 92-93; emphasis added.)

evidence. In these circumstances, the death sentence cannot stand. Eddings v. Oklahoma, 455 U.S. at 119 ("we may not speculate as to whether the [sentencer] actually considered all of the mitigating factors"; "Lockett ... require[s] us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the [sentencer]").[14]

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[14] A contention by the State that any instructional error was harmless because defense counsel urged the jury to consider the mitigating evidence is simply wrong. "[A]rguments of counsel cannot substitute for instructions by the court." Taylor v. Kentucky, 436 U.S. 478, 488-89 (1978); accord, e.g., Carter v. Kentucky, 450 U.S. 288, 304 (same). "Only an instruction from the trial court can invest a particular concept — here the jury's ability to consider nonstatutory mitigating factors -- with the authority of the court." Washington v. Watkins, 655 F.2d 1346, 1375 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982).

III.

ASSUMING ARGUENDO THAT THE TWO INSTRUCTIONS WHEN CONSIDERED INDIVIDUALLY WERE NOT REVERSIBLE ERROR, TAKEN TOGETHER THEY REQUIRE A NEW PENALTY TRIAL

The combined effect of the no-sympathy and mitigating-circumstances instructions requires a new penalty trial. The California Supreme Court must be affirmed under its alternative holding, which is consistent with the position adopted by virtually all other states to consider the issue. Assuming arguendo that a no-sympathy instruction is not reversible constitutional error in all cases, at a minimum it is reversible where, as here, the accompanying instruction on mitigating circumstances is too limiting. Even the state supreme courts that have condoned no-sympathy instructions have done so only where there has been a broad, clear instruc-

tion in nonstatutory mitigating factors of the kind missing here.

The Nevada Supreme Court's decision in State v. Biondi, 699 P.2d 1062 (1985), is typical. In that case, as in the present one, the jury had been instructed not to "be influenced by sympathy, prejudice or public opinion." Id. at 1066 n.2. The Court found that this was not reversible error, but only in light of other instructions accompanying the disputed one. The jury in that case had been given an extremely clear instruction to consider any other circumstance it found to be mitigating. That instruction provided:

> However, the mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death sentence upon Mr. Biondi.... But you should not limit your consideration of miti-

> gating circumstances to these specific factors. You may also consider any other circumstances relating to the case or to the defendant, Mr. Biondi, as reasons for not imposing the death sentence.

Id. (emphasis added).

In fact, the Nevada Supreme Court expressly has distinguished its jury instruction from the restrictive California instruction at issue here. Nevius v. State, 699 P.2d 1053, 1061 (Nev. 1985).

Other state supreme courts to consider no-sympathy instructions have reached results similar to those of the

Nevada Supreme Court.[15] These decisions find the no-sympathy instruction

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15 Illinois — People v. Stewart, 104 Ill.2d 463, 473 N.E.2d 1227, 1241 (1984), cert. denied, 86 L.Ed.2d 267 (no-sympathy instruction not erroneous where jury had been instructed to consider "any other facts or circumstances that provide reasons for imposing less than the death penalty"); accord People v. Perez, 108 Ill.2d 70, 483 N.E.2d 250, 260-261 (1985), cert. denied, 88 L.Ed.2d 93 (1985). But see People v. Wright, 111 Ill.2d 128, 490 N.E.2d 640, 654-55 (1985), petition for cert. filed, No. 85-6783 (affirming death sentence despite sentencer's confusion about relationship between sympathy and mitigating circumstances).

Louisiana — State v. Watson, 449 So.2d 1321, 1331-32 (1984), cert. denied, 83 L.Ed.2d 952 (1985) (no-sympathy instruction not erroneous where jury had been instructed to "consider any other relevant mitigating circumstances, not being limited to those defined," and that it was "free, even in the absence of any evidence in mitigation, to return a verdict of life imprisonment without benefit of parole"); accord State v. Brogdon, 457 So.2d 616, 629 (1984), cert. denied, 83 L.Ed.2d 862 (1985).

Ohio -- State v. Jenkins, 15 Ohio St.3d 164, 473 N.E.2d 264, 288-90 (1984), cert. denied, 87 L.Ed.2d 643 (1985) (no-sympathy instruction not erroneous where jury had been instructed to consider "[a]ny other [mitigating] factors," including those that "in fairness and

FOOTNOTE CONTINUED ON NEXT PAGE

not to be reversible error, but generally only where accompanied by a broadly worded instruction on mitiga-

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FOOTNOTE 15 CONTINUED FROM PREVIOUS PAGE

mercy" might lead to a lesser punishment than death); accord State v. Williams, 23 Ohio St.3d 16, 490 N.E.2d 906 (1986).

Oklahoma — Parks v. State, 651 P.2d 686, 693-94 (Okla. Crim. App. 1982), cert. denied, 459 U.S. 1155 (1983) (no-sympathy instruction not erroneous where jury had been instructed "not [to be] limited in their consideration to the minimum mitigating circumstances set out by the court, but [to] consider any other mitigating circumstances that they found [to] exis[t]"); accord Brewer v. State, 650 P.2d 54 (Okla. Crim. App. 1982), cert. denied, 459 U.S. 1150 (1983).

South Carolina -- State v. Chaffee, 328 S.E.2d 464, 470 (1984) (no-sympathy instruction not erroneous where it was given in lurid rape-murder trial after prosecutor's closing argument, and in response to defendant's objection that prosecutor was attempting to "inflam[e] the passions of the jury" by provoking sympathy for the dead woman and her family). But see State v. Lucas, 285 S.C. 37, 328 S.E.2d 63, cert. denied, 86 L.Ed.2d 729 (1985) (affirming death sentence without elaboration, despite no-sympathy instruction).

ting circumstances.

Such an instruction of course was missing in the present case, and that omission is critical. "A crucial assumption underlying [the jury trial] system is that juries will follow the instructions given them by the trial judge." Parker v. Randolph, 442 U.S. 62, 73 (1979) (per Rehnquist, J). This Court therefore "presumes that jurors, conscious of the gravity of their tasks, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." Francis v. Franklin, 471 U.S. __, 53 U.S.L.W. 4495, 4500 n.7 (1985).

In this case, however, the State urges reversal by assuming precisely the opposite. The State assumes (e.g.,

pp. 26, 53) that the jurors considered all the mitigating evidence despite an instruction to the contrary, and that (pp. 48-49) the jurors gave appropriate weight to the mitigating evidence despite an instruction prohibiting them from being moved by sympathy in their evaluation of that evidence.

These untenable conclusions could only be explained by jury deliberations something like the following:

JUROR NO. 3: Well, I don't think I want Brown to die. It's true he's a murderer, and the crime was awful. But the evidence in the penalty trial showed that he was basically a hardworking, good person; he had terrible psychological problems with women that led

to this rape/murder. The evidence is clear, though, he won't be a problem in prison if we spare his life. He has behaved well in prison in the past. I think I want him to live. I feel sorry for him.

JUROR NO. 5: Oh, no, you can't consider any of that. Remember, the judge and the D.A. told us that we couldn't consider sympathy in imposing sentence. We promised that in voir dire. And look here at the instructions; the judge also told us that we could only consider circumstances that "extenuate the gravity <u>of the crime</u>." You're just talking about sympathetic stuff about Brown

personally. That's not for us to consider.

JUROR NO. 1 [to Juror No. 5]: No, you're wrong about that. I agree that, read literally, that's what the instructions say. But I don't think that's what they mean. Recently, during my routine reading of United States Law Week, I noticed that the U.S. Supreme Court instructed juries to "conside[r], as a mitigating factor, any aspect of a defendant's character of record," not just the circumstances of the offense. So we are free to consider all that evidence, for what

it's worth, even though the instructions don't say so.

[THUS ENLIGHTENED, ALL JURORS ACQUIESCE.]

The State's position assumes that something close to this ludicrous colloquy must have occurred. The law, however, requires more than this shaky assumption. Justice O'Connor made just that point in her concurring opinion in Eddings: "Although one can reasonably argue" that a sentencer confused about the law might have reached the same result if properly instructed, "Lockett compels a remand so that we do not 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" 455 U.S. at 119 (O'Connor, J., concurring), quoting

Lockett, 438 U.S. at 605; see Eddings, 455 U.S. at 115 n.10 (it is not enough that a defendant be allowed to introduce evidence in mitigation; "Lockett requires the sentencer to listen") (emphasis added).

Any test of juror misunderstanding is amply satisfied here. In the present case, the six transcript pages of penalty-phase jury instructions (R.T. 6558-64) contained at least the two errors discussed above. With self-reinforcing errors contained in such short instructions, there can be no contention here that the instructions on the whole properly described

the applicable law.[16] This is not a case where an instructional error was ameliorated by repetitions of correct instructions elsewhere. Compare Francis v. Franklin, 53 U.S.L.W. at 4501 (Powell, J., dissenting) (no error where "trial court [elsewhere] repeatedly impressed upon the jury" the proper legal standard). To the contrary, in this case the harmful impact of each instructional error was aggravated by the other.

16 Recent cases, even those not involving death sentences, reaffirm this Court's consistent teaching. In Francis v. Franklin, 471 U.S. ___, 53 U.S.L.W. 4495 (1985), the question was whether an isolated jury instruction that arguably created a presumption adverse to the defendant violated the rule of Sandstrom v. Montana, 442 U.S. 510 (1979). The Court divided sharply in answering that question, but there was relatively little disagreement on the applicable test. According to the Court, the test is whether "'a reasonable juror could have understood the charge'" in an unconstitutional way. Id. at 4498 (emphasis added). Dissenting Justice Powell appeared to agree that this was the proper test. Id. at 4502.

CONCLUSION

For the reasons stated above, the judgment of the California Supreme Court should be affirmed.

Respectfully submitted,

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